



**INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
SWITZERLAND COUNTY COURTHOUSE**

Derek Scott Geiger v. State of Indiana

Appeal from:
Harrison Superior Court

The Honorable Roger D. Davis,
Judge

Oral Argument:
Wednesday, May 2, 2007
10:30—11:10 a.m.
20 minutes each side

**CRIMINAL LAW
PRETRIAL DISCOVERY**

Did the State's violation of a pretrial discovery order deny Mr. Geiger a fair trial?

DOUBLE JEOPARDY

Do Mr. Geiger's two convictions for Impersonating a Public Servant violate the Double Jeopardy clause of the Indiana Constitution?

PROPRIETY OF ENHANCED, CONSECUTIVE SENTENCES

Did the Harrison County trial court err when it ordered Mr. Geiger's enhanced twelve-year sentence to run consecutively to a Floyd County sentence?

APPROPRIATENESS OF SENTENCE

Is Mr. Geiger's sentence appropriate in light of the nature of his offenses and his character?

CASE SYNOPSIS

**Facts and Procedural
History**

On July 22, 2005, James and Beth Skaggs left their home in Harrison County at approximately 5:00 a.m. to drive to work. As they exited their driveway, Beth observed a Land Rover in the distance, which she considered unusual because of the early hour and the couple's rural location. As the vehicle erratically approached the Skaggses, Beth said, "Honey, pull over and let these idiots pass us." James and Beth immediately noticed that the vehicle had flashing blue and red lights in its front windshield,

and Beth told James, "I bet it's police officers." James pulled over to the side of the road and two men with firearms exited the Land Rover, quickly approached the Skaggses, and yelled at them to exit their vehicle. Two other men remained near the Land Rover.

Defendant Derek Scott Geiger approached James, pointed a nine-millimeter Glock handgun at him, told him that the men were with a narcotics drug force, and alerted him that he and his wife were under suspicion for drug dealing. Geiger, who was wearing a shirt displaying

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a police logo, proceeded to frisk James. Meanwhile, the man near Beth asked her for her identification and bankcard, and both men searched Beth's bag and the vehicle's glove box. Suddenly, a man near the Land Rover who appeared to be on a police radio yelled, "Come on, let's go. We got a call. Let's go, let's go, let's go." The four men immediately returned to the Land Rover and drove off.

While Beth and James were both distressed, they did not immediately call the police because they believed that the four men had been police officers. However, when Beth told her brother-in-law about the incident later that day, he contacted the Harrison County Police Department and learned that there had not been a police stop near the Skaggses' home that morning. After speaking with the police, James selected Geiger's photograph from a photographic array and identified him as the man who had pointed a gun at him and frisked him during the encounter.

As the police began to investigate, they learned that police stops had also been feigned in Floyd County and Clark County the same day. Floyd County Police Department Officer Thad Neafus obtained a search warrant for Geiger's residence and his vehicle, a Land Rover. A search of Geiger's residence uncovered red and blue strobe lights and copies of two books commonly read by law enforcement officers at the Indiana State Police Academy. A search of Geiger's vehicle uncovered a loaded nine-millimeter Glock handgun.

On July 31, 2005, Floyd County Police Department Officer Russell Wyatt

interviewed Geiger. After signing a waiver, Geiger admitted that he was the owner of the Glock handgun and that he had had it with him during the Harrison County incident, but he insisted that he had remained in the backseat of the Land Rover during the encounter.

On August 22, 2005, the State charged Geiger with two counts of class D felony impersonating a public servant, two counts of class B felony criminal confinement, two counts of class A misdemeanor unlawfully pointing a firearm, and two counts of class D felony criminal recklessness. Geiger filed a motion for discovery and production of evidence on November 16, 2005, requesting, among other items, that the State turn over all recorded statements that Geiger had made to the police. The trial court granted Geiger's motion the same day, and the State produced the relevant evidence on December 1, 2005.

On Friday, August 11, 2005—four days before the jury trial was scheduled to begin—the Harrison County prosecutor received a copy of the Floyd County videotape containing Geiger's July 31, 2005, statement to police. It was the first time that the prosecutor had seen the videotape, and he immediately contacted Geiger's defense counsel, Nicolas Haverstock, and invited him to watch the videotape that afternoon. Haverstock declined the invitation.

A jury trial was held on

Case Synopsis (*continued*)

August 15, 2006, and the State played the relevant portions of the videotape for the jury. After hearing all of the evidence, the jury acquitted Geiger of the class A misdemeanor unlawfully pointing a firearm charge related to Beth but found him guilty on the seven remaining charges. On September 5, 2006, the trial court sentenced Geiger to an aggregate term of twelve years imprisonment and ordered that the sentence run consecutively to an aggregate ten-year sentence that Geiger had received for the Floyd County incident. Geiger now appeals.

Parties' Arguments

I. The Videotape

Geiger argues that the State violated a pretrial discovery order by not producing a copy of the videotape, which contained his statement to the Floyd County Police Department. While Geiger admits that the State gave his attorney an opportunity to view the videotape four days before the trial, Geiger contends that the State's failure to actually give him a copy of the videotape deprived him of a fair trial. Geiger further argues that the videotape was overwhelmingly prejudicial because, in the footage relevant to the Harrison County offenses, he admits that he was present at the scene of the crime with a firearm.

The State argues that it promptly responded to Geiger's discovery request in December and that, at the time of its response, it was unaware of the videotape. The State contends that Geiger was on notice of the videotape because the State's

December discovery production referenced the Floyd County interview, although, as the State admits, it did not actually include the videotape. Furthermore, the State asserts that it promptly notified Geiger's attorney after discovering the videotape and gave him an opportunity to view the tape. The State argues that Geiger's proper remedy was to seek a trial continuance, which he failed to do.

II. Double Jeopardy

The principle of double jeopardy protects a defendant from being punished multiple times for the same actions. Geiger argues that his two convictions for impersonating a public servant violate the Double Jeopardy Clause of the Indiana Constitution. Geiger argues that the statute that makes impersonating a public servant a criminal offense focuses on the perpetrator's state of mind when committing the crime, not on the number of victims to whom the defendant misrepresents himself. Thus, Geiger asserts that the State used the same evidence to establish the material elements of both impersonating a public servant convictions and that we must vacate one conviction on appeal.

The State focuses on the two victims of Geiger's offense—Beth and James. The State argues that Geiger's conduct was not directed at society as a whole and, instead, was directed specifically at Beth and James.

Opinion in this case expected:

By end of summer 2007

Mrs. Stearns will be informed when the Court has issued an opinion in this case. Check the Court's website to read the opinion.

For more information, please visit the Indiana Court of Appeals website at <http://www.in.gov/judiciary/appeals/>

Or contact:

Maura Pierce
Indiana Court of Appeals
115 W. Washington Street
Suite 1270 South
Indianapolis,
IN 46204
(317) 234-4859
E-mail:
mpierce@courts.state.in.us

Case Synopsis

Thus, the State contends that Geiger's two convictions for impersonating a public servant were proper and should be upheld.

III. Sentencing

Before Geiger's trial began in Harrison County, he pleaded guilty to armed robbery in Floyd County and that trial court sentenced him to an aggregate term of ten years imprisonment. In the case before us, the Harrison County trial court sentenced Geiger to twelve years imprisonment and ordered that the sentence run consecutively to the Floyd County sentence.

A. Consecutive, Enhanced Sentences

Geiger first argues that the Harrison County trial court did not have the authority to impose the twelve-year sentence consecutively to the Floyd County sentence. Specifically, Geiger directs us to an Indiana statute that requires the trial court to find an aggravating circumstance to impose consecutive sentences. Geiger notes that the only aggravating factor that the Harrison County trial court cited was the Floyd County conviction, which was an improper basis on which to impose consecutive sentences.

Alternatively, Geiger argues that if the trial court had the authority to impose consecutive sentences, Indiana Code sections 35-50-1-1.3(c) and -2 required the trial court to impose the advisory sentences, as a panel of our court recently held in *Robertson v. State*. Thus, Geiger requests that, at a minimum, we remand his case to the trial court and order it to impose the advisory sentence for his

convictions, which would result in an aggregate sentence of ten years imprisonment to run consecutively to the Floyd County sentence.

The State first argues that trial court had the authority to order Geiger's twelve-year sentence to run consecutively to the Floyd County sentence because the Harrison County and Floyd County offenses were not a single episode of criminal conduct. Although the offenses occurred the same day, the State argues that they did not stem from a single episode of criminal conduct. In support of its argument, the State notes that the Harrison County offenses and the Floyd County offenses can each be described without reference to the other.

In response to Geiger's argument that we follow the sentencing analysis in *Robertson*, the State directs us to *White v. State* and argues that *Robertson* squarely conflicts with *White*. In sum, the State argues that *Robertson's* interpretation of the amended sentencing statutes prohibits a trial court from imposing consecutive sentences on the worst offenders, which was not what the legislature intended. Therefore, the State asks that we follow the analysis in *White*.

B. Appropriateness

Geiger argues that his sentence is inappropriate in light of the nature of the offenses and his character. Regarding the nature of the offenses, Geiger points out that he did not physically harm Beth or James and notes that the perpetrators did not steal the Skaggses' vehicle or possessions. As for his character, Geiger argues that he had no prior criminal history except for the Floyd County armed robbery conviction. In sum, Geiger argues that the trial court's sentence is inappropriate because he had no prior criminal history and simply made an error in judgment when he committed the offenses.

The State argues that Geiger's sentence is not inappropriate in light of the nature of the offenses and his character. Regarding the nature of the offenses, the State argues that Geiger's "reward" for not physically harming Beth or James was that he was not charged with crimes such as battery or attempted murder. Turning to Geiger's character, the State argues that Geiger's actions show his failure to lead a law-abiding life and his desire to be entertained at the expense of others. In sum, the State argues that Geiger's sentence is not inappropriate, and it requests that we uphold the sentence imposed by the trial court.

TODAY'S PANEL OF JUDGES

Hon. John G. Baker (Monroe County), Presiding

- Judge of the Court of Appeals since June 1989
- Chief Judge of the Court since March 2007

John G. Baker is originally from Aurora in Dearborn County and lived in Monroe County for 35 years. Since June 1989, he has served as a Judge of the Indiana Court of Appeals representing the First District and has authored more than 3,000 majority opinions. Prior to becoming an appellate court judge, he served as county court and superior court judge for 13½ years in Bloomington, disposing of more than 15,000 cases.

Judge Baker graduated from Culver Military Academy and received his A.B. degree from Indiana University in 1968 in History and his J.D. from the Indiana University School of Law —Bloomington in 1971. He received his LLM in Judicial Process from the University of Virginia in 1995. Before assuming the trial bench, he was a partner in the firm of Baker, Barnhart and Andrews in Bloomington and was a Captain in the U.S. Army Reserves.

Since 1980, Judge Baker has taught as an adjunct professor at Indiana University's School of Public and Environmental Affairs and since 2004 at the School

of Law in Bloomington. In addition, Judge Baker has served on the faculties of the Indiana Judicial College, Indiana Continuing Legal Education Forum, and the National Institute of Trial Advocacy.

His professional associations include the American, Indiana State, Monroe County and Indianapolis Bar Associations. For the latter, he served as Vice-President in 1995. He has been a member of the Indiana Judges Association's Board of Managers continually since 1979 and served as its President from January of 1987 through June of 1989.

Judge Baker has been active in community and civic affairs as well. In addition to his church, YMCA, and other similar organizations, Judge Baker has been active in Boy Scouts of America since his youth and was awarded the rank of Eagle Scout.

Judge Baker was re-elected on the Court by election in 1992 and 2002. He and his wife have five children and – so far – four grandchildren.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

Today's oral argument is the 186th case the Court of Appeals has heard "on the road" since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. L. Mark Bailey (Decatur County)

- Judge of the Court of Appeals since January 1998

L. Mark Bailey was raised in Decatur County on the family farm first homesteaded by his ancestors more than 150 years ago. He was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in January of 1998 and was retained on the Court by election in 2000.

Before his appointment, Judge Bailey was a trial court judge, an administrative law judge, and a practicing attorney. A husband and father, he earned his B.A. from the University of Indianapolis in 1978; his J.D. from Indiana University School of Law at Indianapolis in 1982; and his M.B.A. from Indiana Wesleyan University in 1999. He was elected judge of the Decatur County Court in 1991. From 1992 until his appointment to the Court of Appeals, he served as judge of the Decatur Superior Court.

During his legal career, Judge Bailey has served public interest and professional organizations in various capacities. He chaired the Local Coordinating Council of the Governor's Task Force for a Drug-Free Indiana and the Judicial Conference Alternative Dispute Resolution committee. He also served on the Board of Managers of the Indiana Judges Association and the Judicial Ethics Committee of the Indiana Judicial Center.

Judge Bailey is Past-Chair of the Indiana Pro Bono Commission, having been awarded the Indiana Bar Foundation's Pro Bono Publico Award and the 2002 Randall Shepard Award for his pro bono contributions. His writings include, "A New Generation for Pro Bono," published in the *Indiana Lawyer* in 2006. He is also a certified civil mediator and a Master in the Indianapolis American Inn of Court.

A strong supporter of law-related education, Judge Bailey is currently a member of the Judicial Education Committee of the Judicial Conference of Indiana. He is also an adjunct professor at the University of Indianapolis and, in February of 2006, served as the Distinguished Jurist in Residence at Stetson University College of Law. In 2004, Judge Bailey and his First District colleagues received the Indiana Bar Foundation Law-Related Education Award for their commitment to bringing oral arguments into community settings. Judge Bailey is also a frequent presenter at Indiana Continuing Legal Education seminars, and he regularly volunteers to judge law school trial advocacy and moot court competitions and to teach at National Institute of Trial Advocacy programs.

The 15 members of the Indiana Court of Appeals issue some 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.

TODAY'S PANEL OF JUDGES

Hon. Melissa S. May (Vanderburgh County)

- Judge of the Court of Appeals since April 1998

Melissa S. May was appointed to the Court of Appeals in April of 1998. Judge May was born in Elkhart, Indiana. She graduated from Indiana University-South Bend with a B.S. in 1980 and from Indiana University School of Law-Indianapolis with a J.D. in 1984.

Between law school and her appointment to the Court, Judge May practiced law in Evansville, Indiana, focusing on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, and as co-chair of the Futures Taskforce. In addition, she was a member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994-1999 and has been the co-chair of ICLEF's Indiana Trial Advocacy College from 2001 to 2005. She is a fellow of the

Indiana Bar Foundation, as well as for the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

From 1999 till December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission. In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee.

In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course. Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana.

Judge May was retained on the Court of Appeals by election in 2000.

ATTORNEYS FOR THE PARTIES

For Appellant, Derek Scott Geiger:

Matthew Jon McGovern
McGovern Law Firm
Evansville

Matthew Jon McGovern handles criminal and civil appeals and consultations as a solo practitioner of law in Evansville. Previously he was First Deputy Prosecutor in Floyd County, where he conducted criminal trials and worked with local and federal law enforcement in the detection and prosecution of crime.

Prior to his job as a prosecutor, Mr. McGovern was a judicial law clerk to the Honorable Margret G. Robb of the Indiana Court of Appeals. In this job he researched Indiana law and legal theory, drafted legal memoranda on various appeals involving criminal, personal injury, medical malpractice, corporate contracts and other issues, and reviewed and discussed cases with Judge Robb before panel votes.

Mr. McGovern also worked as a clerk at a law firm in Indianapolis and as a Congressional intern and page in the Washington, DC office and as a campaign aide in the Evansville office of former Congressman Frank McCloskey of Indiana's 8th Congressional District.

Mr. McGovern received his Bachelor of Arts degree in Philosophy and Biology from the University of Evansville in 1994 and his law degree from Notre Dame Law School in 1998. As a member of the National Moot Court Team, he was one of four students to deliver the 1998 Notre Dame Showcase Argument. He has presented appeals before the Indiana Supreme Court and the Indiana Court of Appeals.

For Appellee, State of Indiana:

Cynthia Ploughe
Deputy Attorney General
Indianapolis

Cynthia Ploughe is a native of Tipton County who originally had no intention of attending college. After graduating from Tipton High School, she moved to Washington, D.C. to work for the Federal Bureau of Investigation, which trained her to be a fingerprint examiner. Four years later, she returned to Indiana, and after encouragement from a family friend, she began her collegiate studies at Indiana University in Kokomo. She eventually transferred to Ball State University, earning a bachelor's degree in 1986 with a major in political science and a minor in journalism.

Following graduation, Ms. Ploughe entered Indiana University Law School in Indianapolis and began working at the Office of the Attorney General at the end of her first year. In 1990, after graduating from law school and passing the Indiana bar exam, she was sworn in as a Deputy Attorney General. She conducted research and responded to briefs submitted by defendants in cases such as murder, child molestation, and theft. She regularly presented cases in oral argument before the Indiana Supreme Court and the Indiana Court of Appeals.

In 1997, she left the Attorney General's office to become a deputy prosecutor in Marion County. She first prosecuted misdemeanor crimes — minor drug possession, operating a vehicle while intoxicated, prostitution, shoplifting — but soon began prosecuting felony offenses, including major drug cases, such as dealing cocaine and methamphetamine.

Ms. Ploughe returned to the Indiana Attorney General's office in 2001 and became Section Chief of Criminal Appeals in 2004. She supervises more than a dozen attorneys and acts as an appellate liaison for Indiana's 90 elected prosecutors and their deputies. Prosecutors who obtain a trial court ruling they don't like confer with Ms. Ploughe to determine whether the State will appeal. If a case is appealed, Ms. Ploughe compiles the case record and prepares the Brief of Appellant.